



**REPUBLIC OF KENYA**

**High Court at Embu**

**Miscellaneous Civil Case 53 of 2012**

**DANSON MURIUKI KIHARA.....APPLICANT**

**VERSUS**

**JOHNSON KABUNGO.....RESPONDENT**

**R U L I N G**

The Application herein is dated 2/4/2012. Its brought under section 3A Civil Procedure Act for an Order of Leave to file suit out of time. The grounds are in the body of the application. The same is also supported by the Applicant's affidavit sworn on 2/4/2012. The same has been opposed by the Respondent through his replying affidavit.

The brief facts of this case are that the Applicant had filed Kerugoya P.M.C.C. NO.109/05 against the Respondent herein. His suit was struck out by the Court for lack of jurisdiction. The High Court vide Embu HCA No.29/11 confirmed the decision of the lower Court. The Applicant is keen on having his case heard and therefore wishes to have time for filing suit extended. It is true the Applicant invoked the wrong provision of the Civil Procedure Rules in seeking this extension of time. I wish to mention that Counsels agreed to dispose of this application by written submissions. When the matter was mentioned on 17/12/2012 morning the Respondent's Counsel confirmed that he was filing his submissions the same day. As I write this Ruling he has not filed the same.

The application ought to have been brought under Order 50 rule 6 Civil Procedure Rules. Is this failure fatal to his application?.

This is a straight forward application which is provided for under the Civil Procedure Rules. The application is seeking extension of time to file suit. Under order 51 rule 2 Civil Procedure Rules no application should be dismissed on technicalities not affecting the substance of the application. The interests of justice in this matter would dictate that the Applicant be allowed to present his claim in a Court of law with pecuniary jurisdiction to handle it. The application is not about the merit of the claim. Let the Applicant carry the burden of proving his claim in the appropriate Court.

The application was filed within the shortest time after the Appeal No.29/11 was determined. I therefore allow the application dated 2/4/2012. The Applicant is granted 21 days within which to file and serve his suit. Costs in cause.

**DATED AND DELIVERED AT EMBU THIS 21<sup>ST</sup> DAY OF FEBRUARY 2013**

**H.I. ONG'UDI  
J U D G E**

In the presence of;

M/s Nyaga for M. Kagio for Applicant's

Njue – C/c